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IN THE

Supreme Court of the United States

October Term, 1985

TOM HUDSON AND ASSOCIATES, INC., GEORGE N. BAGDASARIAN, AND G.B. SERVICES, INC., dba SAN DIEGO REFUSE CO.,

Petitioners,

v.

CITY OF CHULA VISTA, SCA SERVICES, INC., and CHULA VISTA SANITARY SERVICES, INC.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[1] All current parties are named in the caption, except for Tom Hudson as an individual, who passed away in March of 1984 while the appeal was pending. A Suggestion of Death on the Record is pending before the District Court pursuant to FRCP 25(a). There are no parent companies, subsidiaries or affiliates of either Tom Hudson and Associates, Inc., or G.B. Services, Inc.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States: Tom Hudson and Associates, Inc., George N. Bagdasarian, and G.B. Services, Inc., the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit issued on October 25, 1984.

QUESTIONS PRESENTED

1. Does a state statute delegating to 5,000 special districts, 480 cities and 58 county agencies the right to enter into trash collection arrangements "by partially exclusive or *wholly exclusive franchise*, contract, license, permit, or *otherwise, either with or without competitive bidding*," constitute an improper "blank check" of antitrust immunity contrary to *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982)?

2. Does a state statute delegating to 480 cities the right to enter into arrangements for trash collection which says *nothing more than* the city may do so "under such terms and conditions as may be prescribed by the legislative body of any such city by resolution or ordinance" constitute an improper "blank check" of antitrust immunity contrary to *Boulder*?

3. May a city grant an exclusive monopoly for both residential trashhauling (often subject to local controls) and front-fork truck commercial trashhauling (usually subject to competition) to a single private entrepreneur without competitive process under the sole authority of the two statutes fully quoted *infra*, with no other authorization and with no requirement for independent state supervision by the *state* or *any other entity*?

4. May the state, prohibited by *Boulder* from granting a state constitutional "home rule" blank check to local governments to fashion antitrust restraints, accomplish the same end by the grant

of legislative blank checks by named industry or area of commerce *seriatim*?

5. Must the state legislature (as the gatekeeper) provide for some required check to compensate for the absent marketplace where it authorizes restraints of trade, including monopoly grants to private parties?

6. May the state authorize unrestricted monopolies and wholly delegate both their fashioning and prospective supervision of private actors to local entities without requirement or specification?

7. Is the requirement of "independent state supervision" met for state action immunity where a city confers a private monopoly for both residential and commercial trash hauling upon one entrepreneur without bidding or meaningful rate review, and collects a highly profitable percentage of the gross revenues derived therefrom for its general fund?

8. What must the state do as gatekeeper to monitor, supervise, limit or guide restraint of trade immunity powers delegated to what may be thousands of different decision makers as to private actors by a single unrestricted grant of authority?

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OPINIONS BELOW

Following hearing on cross motions for summary judgment, the trial court denied Defendants' Motion for Summary Judgment and granted Plaintiffs' partial Motion for Summary Judgment. On September 20, 1983, the court entered the appropriate order together with findings of fact and conclusions of law. Appendix B includes the order then entered. Among the findings and conclusions were the following:

> 4. The two statutes relied upon by Defendants to constitute 'State action' (Health & Safety Code, Section 4250, and Government Code Sections 66,755 through 66,757) confer unlimited discretion to a nonsovereign entity to fashion restraints of trade and do not meet the test of specific authorization by the State Legislature required for State action.
>
> 5. The two statutes relied upon by Defendants to constitute 'State action' include no system whatever for required 'independent State supervision,' either by a State agency or by any other public entity.
>
> 6. Rate regulations by Chula Vista were not required by Chula Vista ordinance as a part of the monopoly agreement; even if properly authorized by State law, the deficient rate regulations as admitted by Chula Vista and the lack of competitive bidding fail to meet minimal standards of 'independent state supervision.'

It was stipulated by all parties that the order issued was appealable and Defendants appealed. Following oral argument, the Ninth Circuit Court of Appeals reversed the trial court in a decision submitted on May 15, 1984, and filed on October 25, 1984. That opinion is included in Appendix A attached hereto. The opinion is reported at 746 F.2d 1370 (9th Cir. 1984). The Court of Appeals held that the Legislature intended to allow the option of

monopoly grants without competitive bidding, the fact of city review was sufficient to constitute independent state supervision, and the rate review of the city did not have to meet utility regulation standards.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1984. A Petition for Rehearing was timely filed on November 7, 1984. Said Petition for Rehearing was denied on February 1, 1985.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

1. **15 U.S.C. Section 1**: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

2. **15 U.S.C. Section 2**: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . .

3. **15 U.S.C. Section 14**: It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or

purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

4. **15 U.S.C. Section 45**: Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. . . .

5. **California Government Code Section 66757**: Local agencies . . . may make . . . provision for solid waste handling services . . . by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding.

6. **California Health & Safety Code Section 4250**: The legislative body of any incorporated city may contract for the collection or disposal, or both, of garbage, waste, refuse, rubbins, offal, trimmings or other refuse matter under such terms and conditions as may be prescribed by the legislative body of any such city by resolution or ordinance:

7. **City of Chula Vista Ordinance Number 1993**: The franchise to collect and dispose of refuse within the City of Chula Vista and to use for such purpose the public streets, ways and places within said City is hereby granted to Chula Vista Sanitary Service, its successors and assigns. . . .

The Grantee of said franchise shall during the term thereof pay to the city four and one-half percent (4½%) of the gross annual receipts of said Grantee. . . .

. . .

. . . Grantee shall have the sole right to pick up, gather, and remove refuse generated by residential and commercial property within the City . . . City will not let any contract to, or enter into any contract with, any other person, firm, or corporation for the performance of the services herein required to be performed by Grantee, except as expressly otherwise herein provided, as long as this franchise is in effect.

City shall protect Grantee's rights to such exclusive contract by proper ordinances, and by reasonable enforcement thereof.

8. **City of Chula Vista Ordinance Number 2104:** SECTION I: That Sections 3, 4, 9 and 11 of Ordinance No. 1993 are amended to read as follows:

Section 3 **Term**

The franchise term shall be extended for the term of five (5) years from and after the current termination date of September 4, 1987 . . . In addition, the grantee shall have two five-year renewal options if the grantee is not in breach of this ordinance and has performed in the manner found satisfactory by the City. . . .

Section 4 **Consideration**

The grantee of said franchise shall during the term thereof pay to the City four and one-half percent (4½%) of the gross annual receipts of said grantee. City is authorized to increase said fee up to a maximum amount of ten percent (10%). Beginning April 1, 1986, the franchise fee shall be increased by one-half percent (½%) and one-half percent (½%) each year thereafter until it reaches a maximum of ten percent. It is understood that any increase in the franchise fee by the City shall be cause for the grantee to increase charges in order to "pass through" the cost of the franchise fee.

The complete texts of California Government Code Section 66757, California Business & Professions Code Section 17200 *et seq.*, and of the City of Chula Vista ordinances are reproduced in Appendix D, *infra*.

STATEMENT OF THE CASE

This case originated in the United States District Court for the Southern District of California. The complaint sought damages and equitable relief for violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. The Complaint also alleged violations of Section 5 of the Federal Trade Commission Act and Section 17200, *et seq.*, of the California Business & Professions Code. Jurisdiction was conferred on the District Court by operation of 15 U.S.C. Sections 15 and 26.

All parties stipulated that the salient facts were not in dispute and filed cross motions for summary judgment in the District Court. The following facts are drawn entirely from the City's own witnesses and the documents in the City file.

"Residential trashhauling" involves the collection of trash placed in small containers owned by homeowners. The containers are picked up regularly and emptied into trash trucks. "Commercial trashhauling" involves the leasing of large containers usually owned by the trashhauler to industrial or commercial enterprises. These containers are emptied with different trucks equipped with large fork mechanisms to lift the bins into the truck. (CR 58, Deposition of Eugene Asmus, at pp. 3-4).[2] Commercial trashhauling does not involve regular routes and has traditionally been subject to competition.

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[2] All references are to the trial court docket number.

A.

EXCLUSIVE RIGHTS

In 1971, the City of Chula Vista granted to the Chula Vista Sanitation Service (CVSS) the exclusive right to pick up both residential and commercial trash within the City of Chula Vista until 1982. (CR 57, Deposition of Gordon Grant, Exhibit 46.) The City conferred on CVSS, a private corporation, an absolute monopoly on both types of trash hauling, and prohibited any competition whatever from any other enterprise. (CR 58, Asmus Dep. at 4-5.) The statutory basis for this action was California Health & Safety Code Section 4250. (See "Statutory Provisions" quoting the authorizing provision in its entirety *supra*.)

The 1971-1982 contract between CVSS and the City of Chula Vista authorized the City of Chula Vista to approve rate changes by CVSS. The contract also gave the City a 2% to 4% "franchise fee" from gross collections by CVSS. (CR 57, Grant Dep. at 12, and Ex. 46.)

B.

SCA MERGER

In 1973, CVSS was absorbed by merger into SCA Services, Inc. ("SCA"), a large conglomerate based in Chicago and active throughout the United States in trashhauling, particularly in New Jersey and the Northeast. SCA and two other larger firms had been absorbing San Diego County's small trashhaulers both before and after this acquisition, particularly where the local trashhauler had obtained "exclusive franchises" (*i.e.* monopolies) from local jurisdictions. (CR 43.)

CR 58, Asmus Dep. Ex. 47 presents the entire file of the City of Chula Vista involving the approval of the 1973 merger. Despite

acknowledgement of widespread allegations of organized crime involvement by SCA Services, Inc. (CR 49, Ex. A), the file reflects the approval of the merger based on the several paragraphs of explanatory material from CVSS. (CR 58, Asmus Dep. at 5-6.)

C.

RATE REVIEW

Rate reviews were handled by the City's "Finance Department," which conducted "rate studies" and made recommendations to the City Council through the City Manager. (CR 57, Grant Dep. at 3-4.) CR 57, Grant Dep. Exs. 39-45 include all of the relevant material available concerning the review of rate increases requested by CVSS since 1975. Rate increases were requested by CVSS in 1975, 1977, 1978, 1980, 1981 and 1982. In each case, the rates requested by CVSS were approved by the City Council just as requested by CVSS.

1. Review.

The rate review process consisted merely of the review of balance sheets and income statistics received from the accountant of CVSS. Verifications of the statements were sometimes requested and, occasionally over the past decade, actual purchase orders were reviewed to determine if monies were in fact spent as the statements described them as being spent. No expenses were ever examined in terms of ratepayer benefit by the standards courts require in maximum rate regulation of utilities. (CR 5, Grant Dep. at 15, 16, 36.)

2. Affiliated Company Dealings.

The City is aware that CVSS purchases equipment and supplies from SCA and borrows money from SCA. SCA wholly controls and owns CVSS. SCA is unregulated. The City has never

examined purchases from SCA or reviewed loan documents to compare prices and interest paid with fair market prices for the items and monies obtained. (CR 57, Grant Dep. at 17-18.) SCA has consistently reported substantial profits from its "local" trashhauling operations. (CR 37, Ex. C, SCA Services Annual Report 1982.)

3. Profit.

The City does not calculate a "rate base" as recognized by the Courts or any rate economist, for the calculation of a proper return.[3]

Of the three elements used to form the "investment basis," upon which CVSS is allowed a "profit," the largest item is long term debt. Although long term debt is included as part of the "investment basis" for which CVSS is entitled to a "return," *the City also allows full deduction of the interest paid on this sum as an expense item*, allowing an acknowledged "double dip." (CR 57, Grant Dep. Exs. 40-45.)

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[3] The City is unclear just what its "investment basis" represents (CR 57, Grant Dep. at 9), but the figures constituting it bear no direct relationship to the fair market value of the capital items "prudently invested and benefiting ratepayers," the legal criteria.

As to the actual capital investment of CVSS, the City of Chula Vista does not know and does not monitor just how much of this equipment is used for the benefit of its ratepayers and how much is used for other purposes. The City is aware of the three elements used to form the "investment" that equipment is leased for profit to the City of San Diego and elsewhere (CR 57, Grant Dep. at 19). The City has not subtracted this outside capital use from the rate base "investment" in calculating a reasonable rate of return, because it does not consider the capital investment value of the enterprise in its calculations at all!

D.

THE MONOPOLY GRANT

1. City Request to CVSS to Apply for Monopoly Grant.

The ten year contract for residential and commercial trash-hauling was set to expire on June 30, 1982. (CR 58, Asmus Dep. Ex. 46.) On October 15, 1981, Tom Hudson of Tom Hudson and Associates wrote to the City Manager of Chula Vista.

Mr. Hudson was a licensed contractor and a trashhauler serving several areas of Southern California. His letter asked for the right to either compete for business within the City, or to bid for the franchise when it expired. The letter was received by the City on October 23, 1981. (CR 58, Asmus Dep. Ex. 49.) The City did not answer the Hudson letter at all. However, three days later, on October 26, Assistant Manager Asmus wrote to CVSS and informed them that, "We have been approached by one firm declaring their intent to compete . . . I would suggest that you direct a letter to the Chula Vista City Council requesting an extension of the present terms and conditions of your contract. . . ." (CR 58, Asmus Dep. Ex. 49.)

On November 20, 1981, Mr. Hudson wrote another letter to the City asking for the right to compete and seeking information. (CR 58, Asmus Dep. Ex. 49.) This letter also was not answered.

During this period, Assistant City Manager Asmus asked the City Attorney if it would be lawful to "renegotiate" the existing exclusive franchise without "opening up the entire process to bid." (CR 58, Asmus Dep. Ex. 49 at 1st par. and at 4-10.) The City Attorney, relying on the *City of Boulder* holding of the Court of Appeals, concluded, in a November 25, 1981 memo, that it would be lawful to grant the monopoly without bidding. (CR 58, Asmus Dep. Ex. 49 at 7-10.) (The Supreme Court subsequently reversed the Court of Appeal, *see infra*.)

On April 28, 1982, George Bagdasarian, an established San Diego County trashhauler, telephoned the City Manager, who noted the message. (CR 58, Asmus Dep. Ex. 49 at 22.) Mr. Bagdasarian also requested the right to conduct business, or at least to bid for business within Chula Vista. Neither Mr. Hudson's nor Mr. Bagdasarian's messages were answered in writing. (CR 58, Asmus Dep. at 11.)

2. The Staff Recommendation.

On May 11, 1982, the City Manager submitted a Council Agenda statement. (CR 58, Asmus Dep. Ex. 49 at 1-3.) Here, the City Manager directly stated the City's plans and rationale. Noting that the City Attorney opined that the process did not have to be bid, the City Manager formally recommended that: "The City Manager be directed to undertake negotiations with the CVSS for the extension of the franchise." *Id.*, at 1. In the discussion which followed, the City Manager noted the grand jury investigation then underway as to County trashhauling, and noted antitrust and organized crime issues being raised, but contended that, "CVSS has unquestionably carried out trash service to the citizens of Chula Vista in an exemplary manner." *Id.* There follows a general listing of the good works of CVSS, consisting primarily of assistance to Girl Scouts and "picking up old clothes washers at no additional charge." *Id.*

Appended to this rather remarkable document is a "Summary of Comparative Rate Schedules Currently Existing" in Chula Vista and several other cities with exclusive private franchises. The summary statement is candidly footnoted, "Data furnished by Chula Vista Sanitary Services - not verified." (CR 58, Asmus Dep. Ex. 49 at 3.)

The Council Agenda Statement concludes that, "Based on the opinion of the City Attorney and the above statements, it is my recommendation that the City Council direct me to enter into negotiations for a new franchise agreement with CVSS and that

the matter not be put out to bid." (CR 58, Asmus Dep. Ex. 49 at 2.)

3. Agenda Item.

The City Council approved the agenda item as stated. In compliance with the Brown Act (California Government Code Sections 54950-54961), general notice was given concerning the extension. The agenda item was specifically drawn and limited to the granting of an exclusive franchise to CVSS. (CR 58, Asmus Dep. Ex. 49 at 1.)

4. CVSS Drafts.

On May 14, 1982, CVSS wrote to the City Manager: "The City Council recently directed City Staff to negotiate an extension to the existing refuse collection agreement, which expires June 30, 1982. Timely completion of this task is important . . . To assist . . . we have developed preliminary suggested modifications to the City Ordinance and proposed terms for the Franchise Agreement. The draft documents follow." (CR 58, Asmus Dep. Ex. 49 at 11, 24-33.)

5. Letters, Resolutions, Hearing.

On May 27, 1982, the Broadway Association of small businessmen wrote the City Council asking that trashhauling be subject to open bidding, and that commercial trashhauling be distinguished for separate treatment: "We believe it is wrong to lock businesses into an air tight contract with only one collection company. The Business Community is at their mercy with no recourse." (CR 58, Asmus Dep. Ex. 49 at 23.)

On June 16, 1982, the City Council, citing "public health, safety and well being," passed a resolution of "intent" to grant an exclusive franchise to CVSS. (CR 58, Asmus Dep. Ex. 49 at 13-17.)

On July 27, 1982, the contract was reduced from a proposed ten years to five years by action of the Council but was otherwise approved substantially as written in the CVSS drafted documents referred to above. (CR 58, Asmus Dep. Ex. 49 at 35-50.) The ordinance cited as its sole statutory authority: "Health & Safety Code Section 4250."

6. The New Agreement.

The new ordinance and agreement gives CVSS the exclusive right to operate within the city limits of Chula Vista. The monopoly includes the collection of both residential and commercial trash. No other enterprise may compete or offer such collection services for money within the City for the five year term of the agreement. (CR 58, Asmus Dep. at 4-5; Ex. 49 at 31.) There is no provision for mandatory rate controls under any criteria or guidelines coextensive with the grant of monopoly power. (CR 58, Asmus Dep. Ex. 49 at 24-33, 44-52.)

7. Health and Safety.

CR 58, Asmus Dep. Ex. 50 presents the health and safety ordinance of the City of Chula Vista pertaining to trashhauling. Most of its provisions apply to homeowners. The City is aware that the enforcement of this ordinance or any other health and safety concern of the City of Chula Vista does not require an exclusive franchise to any trashhauler. (CR 58, Asmus Dep. at 18-21.) The City is aware that the City of Coronado bids for its trashhauling contract, that the City of San Diego picks up its own trash, that the City of Oceanside has an exclusive franchise with a commission strictly overseeing rates and services, and that the County has open competition with general and easily obtainable permits (revocable where there is a health or safety violation). (CR 58, Asmus Dep. at 18-19.) The City is unaware of any health and safety problems attendant to any of these alternative arrangements for these nearby jurisdictions or for any others. (CR 58, Asmus

Dep. at 18-19.) The City is not aware of any problems in any locale which have resulted from a failure to grant an exclusive franchise to a trashhauler. (CR 58, Asmus Dep. at 20.)

8. Annexation Impact.

On February 12, 1982, the City annexed part of the Montgomery area serviced by Elmer Mikklesen. Mr. Mikklesen was informed he would have a substantial grace period in which to abandon the area to the exclusive trashhauler of Chula Vista, CVSS. (CR 58, Asmus Dep. Ex. 51.) Mr. Mikklesen sold out to SCA in early 1983.

9. Mandatory Fees.

On September 7, 1982, a public hearing was held to consider a proposal originating back in the 1970's from CVSS. (CR 58, Asmus Dep. at 8-9.) The proposal was to implement a "mandatory fee" requiring all residents of Chula Vista to pay for trash collection services (residential) whether they used them or not. The proposal was adopted. (CR 58, Asmus Dep. Ex. 52.)

Both franchise fees going to the City of Chula Vista and trash rates were increased in 1982. (CR 58, Asmus Dep. Ex. 52.) Each Chula Vista household now pays $5.60 per month for a residential trashhauling service ($5.94 on a non-mandatory basis). An exemption is available for persons able to prove they visit the dump no less than once each week. Applications for exemption are handled "through CVSS and the City does not know of anyone who has obtained one." (CR 58, Asmus Dep. at 27, lines 21-26.)

10. Conflict of Interest.

CR 37, Ex. D presents a series of memos from the City Attorney concerning the fact that Councilman Scott, who is a stock broker, happens to have as a client the principal owner of CVSS and receives substantial but undetermined commissions from him.

11. New Ordinance.

Although not part of the record, official documents of the City of Chula Vista, of which Judicial Notice may be taken, establish the revision of the exclusive franchise of CVSS just after the Ninth Circuit decision herein. The CVSS exclusive franchise was extended without bidding or rate regulation requirements to the year 2002. An automatic rate increase "pass through" was approved without City review based on the CPI, and the City's "franchise fee" was scheduled for step increases from the existing 2-4%, up to 10% of gross revenues. (See Ordinance Number 2104 in Appendix D.)

ARGUMENT

I.

THE CIRCUITS ARE IN VIGOROUS DISARRAY ON THE ISSUE OF STATE ACTION IMMUNITY STANDARDS APPLICABLE TO COUNTIES, CITIES AND SPECIAL DISTRICTS.

The Circuits agree in theory that: (1) the State legislature must have authorized a challenged municipal restraint of trade; (2) the legislature must have intended to displace competition; and (3) immunity can be conferred if the challenged restraint is a necessary and reasonable consequence of engaging in the authorized activity.

We do not believe any Circuit will currently argue that the restraint must be "compelled" by State statute, and we do not so argue. At this point, where we address standards for fashioning private restraints formulated by local agencies, the tests diverge. All Circuits begin the next question roughly as follows:

WHERE THE STATE INTENDS TO AND DOES AUTHORIZE AN ANTICOMPETITIVE SYSTEM ADMINISTERED BY NON-SOVEREIGN CITIES . . .

TEST 1: THE CITY MUST DEMONSTRATE BY CONVINCING REASONING THAT THE CHALLENGED RESTRAINT IS NECESSARY TO THE "SUCCESSFUL OPERATION OF THE LEGISLATIVE SCHEME THAT THE STATE AS SOVEREIGN HAD ESTABLISHED," AND IS ONE WHICH PROVIDES FOR INDEPENDENT STATE SUPERVISION.

This is apparently still a viable test of the First Circuit, which appears unimpaired by *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). *See, Corey v. Look*, 641 F.2d 32, 37 (1st Cir. 1981).

TEST 2: THE CITY MUST SHOW ONLY THAT THE RESTRAINTS ARE "REASONABLY RELATED TO AN AGENCY'S EXPRESS POWERS AND REASONABLY DESIGNED TO PROMOTE THE STATE AIMS WITHIN A DESIGNATED FIELD OF REGULATION" WITHOUT STATE ADMINISTRATION OF INDEPENDENT STATE SUPERVISION.

Specifically quoting and rejecting the First Circuit test, the Sixth Circuit posits this alternative test in *Hybud v. City of Akron*, 742 F.2d 949, 961 (6th Cir. 1984); rejecting *Corey* at 960.

TEST 3: THE CITY MUST "ARTICULATE LEGITIMATE GOVERNMENTAL INTERESTS ADVANCED BY ITS CONDUCT WHICH PUT AT ISSUE WHETHER THE GAINS REASONABLY EXPECTED TO BE ACHIEVED BY ITS ANTICOMPETITIVE CONDUCT JUSTIFY THE DEGREE BY WHICH COMPETITION WAS REASONABLY EXPECTED TO BE DIMINISHED," EVEN WHERE THERE IS PROVISION FOR INDEPENDENT STATE SUPERVISION.

The third test is Judge Higginbotham's attempt in the Fifth Circuit to explain in his concurring opinion what the criteria must be for evaluating city restraints. After enunciating what the Judge believes to be the test implicit in the majority holding, the Court notes, with appropriate understatement: "Application of such a rule will not be easy." See *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1572 (5th Cir. 1984).

TEST 4: THE STATE NEED NOT REQUIRE INDEPENDENT STATE SUPERVISION EITHER BY ITSELF OR THE DELEGATEE, AND IT NEED NOT BE PROVIDED, SO LONG AS THE STATE INTENDS THE RESTRAINT.

This is the test of the Ninth Circuit, quite apart from the instant case. By far the most liberal to local government, this Circuit asks simply if the Legislature "intended" for a restraint to be exercised by a city. The nature of the city itself confers "independent state supervision." See, in addition to the instant opinion, *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*, 753 F.2d 790 (9th Cir. 1985). "We will assume that the legislature contemplated the act if the challenged restraint was a necessary or reasonable consequence of engaging in the authorized activity." *Id.* at 793. Once it is established that a city is the delegatee of the State, there is no requirement to show active state supervision: "The final question is whether the City must show active state supervision to qualify for *Parker* immunity. We hold that it does not." *Golden State Transit Corporation v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984).

TEST 5: IF THE CITY IS PERFORMING A TRADITIONAL MUNICIPAL FUNCTION, AND IS SUPERVISED BY A STATE AGENCY, IMMUNITY IS PRESERVED.

This is a narrower test used by the Seventh Circuit in *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 383-84 (7th Cir. 1983), *cert. granted*, __ U.S. __, 104 S.Ct. 3508 (1984), *affirmed*,

__ U.S. __, (No. 82-1832) (1985). (See discussion of Supreme Court opinion *infra*.)

TEST 6: WHERE THOSE CITIES PERFORM IN A NON-PROPRIETARY (*I.E.*, GOVERNMENTAL) CAPACITY, PROPER DELEGATION ESTABLISHES IMMUNITY WITHOUT FURTHER INDEPENDENT STATE SUPERVISION, INVOLVEMENT OR INSTRUCTION.

This is the test enunciated by the Eighth Circuit. *See, Scott v. City of Sioux City, Iowa*, 736 F.2d 1207, 1214 (8th Cir. 1984); *see also, Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983). Where no private actors are involved, this is also the test of this Court in its *Hallie* opinion (see *infra*).

At the District Court level, the reflective divergences can be surveyed through a quick reading of the following cases: *Campbell v. City of Chicago*, 577 F.Supp. 1166 (N.D. Ill. 1983); *LaSalle National Bank v. County of Lake*, 579 F.Supp. 8 (N.D. Ill. 1984); *Century Federal v. City of Palo Alto*, 579 F.Supp. 1553 (N.D. Cal. 1984); *Miami International Realty Co. v. Town of Mt. Crested Butte, Colorado*, 579 F.Supp. 68 (D. Colo. 1984); *Locary v. Kayfetz*, 587 F.Supp. 631 (N.D. Cal. 1984); *Central Telecommunications v. City of Jefferson City*, 589 F.Supp. 85 (W.D. Mo. 1984).

Perhaps one of the most amusing attempts to comprehensively cite the law in this area is in the Fifth Circuit's opinion in *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984), where the string of cites leading from *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the major case preceding *Boulder* on this subject, reads as follows:

> *Whiteworth v. Perkins*, 559 F.2d 378, 381 (5th Cir. 1977), *judgment vacated*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978), *judgment reinstated*, 576 F.2d 696 (1978), (Decided July 17) (per curiam); *Kurek v. Pleasure Driveway and Park*

District of Peoria, 557 F.2d 580 (7th Cir. 1977), *judgment vacated*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978), *judgment reinstated*, 574 F.2d 892 (7th Cir. 1978) (Decided Sept. 18) (per curiam), *cert. denied*, 439 U.S. 1090, 99 S.Ct. 873, 59 L.Ed.2d 57 (1979); *Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025, 1029 (N.D. Tex. 1978) (decided Nov. 29); *United States v. Texas State Bd. of Public Accountancy*, 464 F.Supp. 400, 403-04 (W.D. Tex. 1978) (decided May 5), *modified on other grounds*, 592 F.2d 919, *cert. denied*, 444 U.S. 925, 100 S.Ct. 262, 62 L.Ed.2d 180 (1979); *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth.*, 451 F.Supp. 157, 166 (S.D.N.Y. 1978) (decided May 3); *Contra Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975).

City of Houston, supra, 735 F.2d at 1569.

II.

THIS HONORABLE COURT'S DECLINATION TO CLARIFY INDEPENDENT STATE SUPERVISION REQUIREMENTS VIS-A-VIS COUNTIES, CITIES, AND SPECIAL DISTRICTS AS RELATED TO PRIVATE PARTIES IN *BOULDER* AND *HALLIE*, ALTHOUGH APPROPRIATE FOR THE DECISIONS THEREIN, UNDERLIES THE CURRENT CONFUSION.

The Fifth Circuit delicately put the problem as follows: "The Supreme Court in *City of Lafayette* and *City of Boulder* left the inferior courts with the exquisite task of fitting the antitrust laws to municipal government. The rule of reason is at the center of the uncertainty." *Affiliated Capital Corp. v. City of Houston, supra*, 735 F.2d at 1571. We respectfully suggest that the "rule of

reason" is not at all at the center of this controversy, which illustrates the depth of the confusion.

The guidance vacuum on the issue of independent state supervision is critical. One Circuit notably absent from the summary listing of various theories, *supra*, the 10th Circuit, has addressed the issue by ignoring it. Its analysis simply skips over the independent state supervision question (*e.g. see, Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982), *cert. denied*, 459 U.S. 1126 (1983).

This Honorable Court, in *Town of Hallie v. City of Eau Claire*, __ U.S. __ (No. 82-2832) (Decided March 27, 1985), has wisely clarified two points. First, if state law gives the City of Eau Claire the right to either build a sewage treatment plant or not, the grant of a non-mandatory choice does not mean the statute is "neutral" and barred by *Boulder*. Second, the fact that the City is operating the plant itself, as a City endeavor, constitutes "independent state supervision."

The first holding makes perfect sense, for a policy to restrain trade can be expressed as an alternative. And the latter holding provides a sensible bright line test, for if the plant is publicly managed, it is reasonable to presume independent state supervision -- and to subject the matter to local political forces *within the ambit* of the clearly articulated state policy. There is no third party impact, except as the local authority operates directly to carry out its mandate. There is no danger of corruption in the granting of favors between contending private parties, the exclusion of some private parties in favor of others, monopoly rates enriching private entrepreneurs, or the other abuses we can expect from what the instant defendants herein seek. As this Honorable Court stated: "Where the actor is a municipality rather than a private party, there is little or no danger that it is involved in a private price-fixing arrangement. The danger that a municipality will seek to further purely parochial public interests at the expense of more overriding state goals is minimal, because of the requirement that

the municipality act pursuant to a clearly articulated state policy." *Hallie, supra*, at ____.

However, we now are faced with a double dilemma. For the instant case does not present a statute with a restraint of trade alternative. It presents a statute which simply states that the local jurisdiction can do WHATEVER it wants, period. And, second, the case raises the issue of private party regulation in its full panoply of projected abuse. This Honorable Court has foreseen the question raised by this case in its prescient footnote 10 in *Hallie*: "Where state or municipal regulation of a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists. See *Southern Motor Carriers Rate Conference, Inc. v. United States, supra*, __ U.S. __ at ____." *Hallie, supra*, at note 10. With all due respect, the Ninth Circuit does not agree with this essential proposition, and five of the other Circuits are awash in confusion.

Here, we have no state policy, except one of abdication. We have no provision for independent state supervision in the statute, no provision requiring it in the local ordinance, and unsurprisingly, no reasonable supervision exists.

Hallie does not clarify what *Boulder* means where there is a gauntlet thrown to it: a complete legislative blank check directed at a particular industry. And, *Hallie* does not clarify a meaningful rule in the gap it acknowledges as to independent state supervision by municipalities, *i.e.*, what must be done where the actors are private parties? Likewise, *Southern Motor Carriers Rate Conference, Inc. v. United States*, ____ U.S. ____; 105 S.Ct. 1721 (Decided March 27, 1985), does not help clarify the existing gap. That case concerns an acknowledged state policy to permit private price fixing in trucking, subject to coextensive and mandatory review by state public utility commissions. *Southern Motor Carriers* focuses on whether the state statutes involved need be mandatory in carving a restraint or whether they can be permissive. Plaintiffs in this case have always conceded that a delegated restraint can be permissive. Our questions of "blank

check" neutrality and lack of any specified system in state law for independent supervision were not at issue there.

The instant case is an easy one for this Court in its elemental framework, for if *anything* need be done, the Ninth Circuit must be reversed. Hence, the case affords the opportunity to state the *de minimus* requirement by way of a bright line rule we respectfully proffer *infra*: a rule designed to define the interaction between an authorized system of restraints administered by a local government and independent state supervision.

The Circuits refusing to grant *carte blanche* to thousands of local jurisdictions through general state authorizing language are groping for some standard to limit the inevitable result: the fragmented erosion of a competitive marketplace into a plethora of "franchises," a sanitized word for local private monopolies, arranged without check. To be direct, the fear is the wholesale corruption of local government and the carving out of territories in numerous areas of commerce amenable to deals, not to competition. The Ninth Circuit signal has already sent the special interests scurrying into Sacramento with bills to devolve into the hands of 5,000 special districts, 480 cities and 58 counties unfettered authority to fashion restraints in a host of areas. In a state which has traditionally banned public project grants by local government of over $25,000 without competitive bidding, we now witness the power to hand out absolute monopolies without bidding or market check and worth many millions of dollars to the recipients. At the same time, local government entities have legitimate needs which may involve creations of "natural monopolies" or regulation for the health and safety which must restrain trade.

The solution rests with a test to provide independent state supervision guaranteeing the role of the state as gatekeeper, while maximizing local agency flexibility. The tests attempted by many Circuits exist because most of the courts wish to provide some check to otherwise unfettered restraint formation by thousands of local jurisdictions. The quandary of each of these courts arises because each looks at the wrong place for the test: at the city and its

characteristics. The proper test is to be fashioned by applying the gatekeeper concept initiated by this Honorable Court: look to the state, not to provide independent state supervision, but to provide *for* such supervision by an entity whenever there is an authorized restraint delegated to a private party subject to local agency supervision.

III.

A PROPER AND LOGICAL TEST EXTENDS FROM THE *BOULDER* HOLDING TO END CONFUSION AND PROVIDE A WORKABLE STANDARD.

What must the state say or do about independent state supervision when it authorizes serious powers to restrain trade to private parties as formulated by hundreds or thousands of nonsovereign entities?

Can the state express a "scheme to restrain trade" which includes a number of options, some of which do not restrain trade and others which restrain harshly? We would suggest "Yes." Can it delegate the administration of the restraints to hundreds of nonprivate bodies? Although the result may be disadvantageous fragmentation, and there is language in cases *contra*, we suggest "Yes" here, too.

This Honorable Court can give maximum flexibility with a two-part bright line rule.

The first part of the suggested test is: WHERE THE STATE AUTHORIZES A RESTRAINT OF TRADE OPTION TO A LOCAL AGENCY, OR TO A STATE AGENCY, IT MUST CONCURRENTLY PROVIDE FOR SOME SYSTEM TO COMPENSATE FOR THE ABSENT MARKETPLACE.

This most elemental prescription is violated by the Ninth Circuit, and by the instant statute. The two short statutes here in question confer a series of options to hundreds of local agencies.

Among them is the option of absolute monopoly grant -- without rate regulation, without competition of any kind (even in the area of commercial trashhauling traditionally subject to competition) and without competitive bidding. There is simply nothing from the state except a naked grant of immunity from the market place and from antitrust exposure. Unfettered monopolies may be created by any one of hundreds of persons.

The initial test we have proposed addresses the most egregious abuses easily and quickly. The state can grant to local agencies the power to go so far as to create absolute monopolies in an area of commerce. And, it may do so as one out of a number of options. But for each such option which restrains trade, that law or another applicable state law must provide for *some* compensating system. No court need suggest what that system must be, but it must provide *for* independent supervision and it must address in some sense the market deficiencies created by the restraint. That check can take any number of alternative forms: where the restraint is a private monopoly, it could be a requirement that maximum rates be set by a public body, or a requirement for competitive bidding, et al. But, *something* must be provided for. This is not difficult for the state to do and it has no business delegating such power to fashion restraints for private parties without it.

The second part of the suggested test is: WHERE THE POWER TO FASHION AND ADMINISTER AMELIORATING SYSTEMS TO COMPENSATE FOR THE ABSENT MARKETPLACE IS DELEGATED BY THE STATE TO A NON-SOVEREIGN ENTITY, THAT ENTITY MUST NOT HAVE A PROPRIETARY OR FINANCIAL STAKE IN A RESTRAINT CONFERRED TO PRIVATE PARTIES.

This naturally flows from the "independent" requirement of independent state supervision. This Court, in *California Liquor Dealer's Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), recognized the inappropriate delivery by the state (as gatekeeper) of the right to supervise restraints to entities with a narrow, private or proprietary stake. Cities and districts are public bodies. Some

governing boards are elected. Some have appointed boards of directors (most special districts). Local agencies are often fragmented bodies, both geographically and by function. Special districts exist to provide everything from water to powerful agricultural interests to mosquito abatement. Few have substantial powers to tax, a sovereign function. But, to the extent they can tie a restraint's excess profits to their own benefit independent from their own operations, they have the same kind of bias and opportunity for private sector abuse which undermines their bona fide provision of independent state supervision.

In the instant case, we have this deficiency. The City of Chula Vista has arranged a lucrative "franchise fee" for its own treasury out of gross revenues and unrelated to any costs of supervision. It is getting a proprietary cut of the excess profits it allows to the private monopolist it has created.

IV.

BOULDER DID NOT ANSWER THE QUESTION OF SEQUENTIAL "BLANK CHECK" IMMUNITY GRANTS BY AREAS OF COMMERCE.

Quite apart from the issue of independent state supervision, the instant case raises a fundamental question not addressed by the Court in *Boulder* and not yet addressed by any of the Circuits. It concerns the evasion of the *Boulder* standard by state legislatures. It is a momentous question not raised in any other case now before this Honorable Court.

In the instant case, the Defendant trashhauler, acting through its trade association, wrote a "blank check" authorizing statute. (California Government Code Section 66757.) It was not a Constitutional "home rule" mandate. Rather, it was a listing of every possible specific option which could define local interaction with trashhauling, followed by the phrase "or otherwise" for good measure. The other statute involved here reads in its relevant

entirety: ". . . [A] . . . city may contract for the collection or disposal, or both, of garbage waste, . . . under such terms and conditions as may be prescribed. . . ." (California Health & Safety Code Section 4250.)

Query, can statutes of this kind be used in smorgasboard fashion, industry by industry, to provide sequential blank checks, notwithstanding *Boulder*? Is the Ninth Circuit correct in its remark in oral argument that *Boulder* is only relevant on the issue of home rule for all areas of commerce? Is the Ninth Circuit correct that the only inquiry relevant is whether the legislature intended to allow absolute monopolies without competitive bidding, and if that was on the all inclusive list, the inquiry is ended?

These are not speculative questions. The answers will determine the make-up of authorizing legislation in industries ranging from cable television to many areas not heretofore associated with local government, including medical services, catering, taverns, auto dealerships, public event sponsorship, solar power equipment sales, et al., to name a few, all involving local government regulatory and "franchise" interests.

V.

THE EVASION OF THE *BOULDER* "BLANK CHECK" HOLDING OF THIS COURT WILL BE A RECURRING ISSUE IN DETERMINING ANTITRUST IMMUNITY, WITH IMPLICATIONS FOR THE MARKETPLACE, STATE LEGISLATIVE RESPONSIBILITY AND LOCAL AGENCY ABUSE.

Lost in much of the discussion about municipalities and state action is the fact that the holdings apply to thousands of special districts set up for all sorts of fragmented purposes. These decisionmakers are appointed and operate in uncoordinated fashion, one from the other. For every city government, themselves

fragmented and often with proprietary interests, there are 10 such districts.

The Ninth Circuit has literally held that a blank check grant of immunity for an industry, created and administered by any one of thousands of such persons in their respective discretion and subject to safeguards as they may individually choose, is proper. This ruling simply cannot be allowed to stand. It is quite literally a blank check for blank checks.

Moreover, the ruling is irresistable for local agencies. They may support legislation which grants unfettered powers to them to fashion antitrust restraints. Such sweet plums these are. The consequence is large scale corruption and abuse, leading to systematic bribery and gradual erosion of marketplace entry and fluidity. These strong sentiments are not made out of hyperbole.

With all due respect, the Supreme Court should not play "where's the pea" with an issue which involves so many institutions and such important principles and consequences.

VI.

THE INSTANT CASE IS THE APPROPRIATE VEHICLE TO (A) DEFINE THE INDEPENDENT STATE SUPERVISION RESPONSIBILITY OF THE STATE IN DELEGATING RESTRAINT CREATING POWERS TO LOCAL JURISDICTIONS, AND (B) MAKE CLEAR THE PROHIBITION ON "BLANK CHECK" IMMUNITY LEGISLATIVE GRANTS BY INDUSTRY.

In the two companion cases unfortunately combined with this case for argument before the Ninth Circuit, and others, the question is: what did the legislature intend? Did it mean to allow price setting powers when it said "license and regulate?" Did it imply the power to limit production when it said "review and approve?" Or the issue raised is a corollary of intent, did the defendants

conspire to evade the intent of the legislature by subverting a required legitimate bid process?

This case does not raise the issue of intent at all. Plaintiffs believe that the legislature fully intended to allow monopolies without rate regulation, bidding, or any form of competition. Indeed, since the trashhaulers wrote the statute, any other meaning is easily eliminated. The question here is unique: can the "gatekeeper" simply give a blank check, expressing complete neutrality itself about which alternative is selected, competition alternatives, partial regulation or absolute monopoly? Can such alternatives be conferred as to private beneficiaries without provision for *any* mechanism to compensate for the absent marketplace?

Moreover, the facts of this case afford an excellent opportunity to clarify fully the responsibility of the state as gatekeeper in providing for independent state supervision. The case is focused on the state and the legislation, not on the acts of entrepreneurs. The facts of the case are *in extremis*: a complete blank check; a grant of monopoly power covering not only traditionally regulated residential trashhauling but the entirely separate and traditionally competitive industry of commercial large bin hauling; no health and safety issues (which are treated by separate ordinances, not questioned in this case); a refusal to provide for any independent state supervision requirement of any sort whatever by the state; and a decision by the local delegatee here to give a monopoly to one entrepreneur without competitive bidding. Then there are several unsurprising facts: a "rate review" system which approved each and every request and which is an admitted farce (most of the hauler's expenses are from the wholly owned parent defendant SCA Services, Inc. and are unmonitored); the refusal of the City to entertain bids even when approached; discriminatory warnings and communications to the favored entrepreneur by the City about the activities of the Plaintiffs; a refusal to allow bidding because, according to the then City Attorney, the Supreme Court would never overturn the Circuit Court in *Boulder* upholding blank checks; and, of course, the role of the president of a local

trashhauler as an important client in the stock brokerage business of one of the Councilmen. Events following the Ninth Circuit decision include the nonbidding extension of the monopoly to the year 2002, automatic rate increases based on the CPI (unrelated to trashhauling costs) and, perhaps predictably, the upscale of the City's "franchise fee" to 10% of the gross, four times its previous level (see Appendix D).

The statute, and the illustrative abuses resulting, form a useful background for this Honorable Court to establish the clear standard we respectfully proffer and to end confusion and properly balance the legitimate competing interests.

CONCLUSION

Based on the foregoing, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

CLARK & GUMPEL
A Professional Corporation

By: _____
ROBERT C. FELLMETH

Attorneys for Petitioners TOM HUDSON & ASSOCIATES, INC., et al.

APPENDICES

A.

OPINION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
OCT 25 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

TOM HUDSON & ASSOCIATES, INC., and TOM HUDSON,

Plaintiffs-Appellees,

v.

CITY OF CHULA VISTA, SCA SERVICES INC., and CHULA VISTA SANITARY SERVICE, INC.,

Defendants-Appellants.

CA No. 83-6467

DC No. CV 82-1723

OPINION

Submitted: May 15, 1984

Appeal from the United States District Court
for the Southern District of California
Earl B. Gilliam, J., presiding

Before: ANDERSON, SKOPIL, and POOLE, Circuit Judges

POOLE, Circuit Judge:

This case presents the issue whether California cities are exempt from federal antitrust scrutiny when granting exclusive trash collection franchises.

I.

Plaintiffs-appellees are two trash removal companies, Hudson & Associates and G. B. Services, and their individual owners. Defendants-appellants are the City of Chula Vista, California, and Chula Vista Sanitary Services (CVSS), a competing private trash colletion [*sic*] firm, which since 1971 has held a contract with the city of Chula Vista to provide all commercial and residential trash collection services within the city limits. This exclusive trash-collection franchise is protected by city ordinance. Chula Vista Municipal Code § 8.24060.

Beginning in late 1981, plaintiffs wrote to officials of Chula Vista seeking to compete for contracts to provide trash collection in that city. They received no answer.

Instead, in July, 1982, Chula Vista renewed its exclusive trash collection contract with CVSS for five years. The renewal was made without competitive bidding. In December, 1982, plaintiffs filed the present action, alleging that the exclusive franchise granted to CVSS violates both federal and state antitrust laws. On cross-motions for summary judgment and partial summary judgment, the district court held that the city's actions did not constitute protected state action under *Parker v. Brown*, 317 U.S. 341 (1943), and granted partial summary judgment to plaintiffs. Because the applicability of the state action exemption to the city is a separable and dispositive issue, this court granted permission for interlocutory appeal. 28 U.S.C. §1292(b). We reverse.

II.

The effect of federal antitrust laws on local and municipal governments has been of growing concern in light of two relatively recent decisions of the U.S. Supreme Court. *Lafayette v. Louisiana Power & Light Company*, 435 U.S. 389 (1978); *Community Communications Co., Inc. v. Boulder*, 455 U.S. 40 (1982).

In *Parker v. Brown*, 317 U.S. 341, 352 (1943), the Court held that Congress did not intend federal antitrust laws to apply to the acts of States "as sovereigns." More than thirty years later, however, the *Lafayette* and *Boulder* decisions limited the *Parker* state-action doctrine and declared that municipalities, "simply by their status as such," do not share the State's antitrust immunity. In *Lafayette*, the Court held that a city could be sued for alleged antitrust violations committed by its wholly-owned municipal power company. The plurality of the Court in *Lafayette* stated that such municipal conduct is unprotected by *Parker v. Brown* unless the city acts "pursuant to [a] state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. Adopting language from cases that had applied *Parker v. Brown* to actions of state agencies, *see Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the plurality stated that cities and other local governmental entities would be protected by the state's antitrust immunity so long as their conduct was authorized by a "clearly articulated and affirmatively expressed * * * state policy." 435 U.S. at 410.

In *Boulder*, a majority of the Court adopted the position of the *Lafayette* plurality: that the municipal acts are exempt from federal antitrust standards only when they are done pursuant to a "clearly articulated and affirmatively expressed" state policy. 455 U.S. at 51. The Court rejected the City's contention that, as a home rule city under the Colorado constitution with "full right of self-government in both local and municipal affairs," its own regulation of local cable television suppliers was the equivalent to that of the state. 455 U.S. at 53. Far from demonstrating a clearly articulated and affirmatively expressed state policy, the Court explained, the home rule provision showed only a "position * * * of mere *neutrality* respecting the municipal actions challenged as anticompetitive." 455 U.S. at 55. "Acceptance of such a proposition --that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances--would wholly eviscerate the concepts of 'clear

articulation and affirmative expression' that our precedents require." 455 U.S. at 56.

The foregoing cases, however, did not hold that the challenged municipal conduct need be inescapably mandated by the State. *See Turf Paradise Inc. v. Arizona Downs*, 670 F.2d 813, 823 n. 8 (9th Cir. 1982). Though neutrality is not enough, something less than strict compulsion is necessary to extend immunity to local government. Rather, to determine that *Parker v. Brown* immunity applies, a court need only find that, "from the authority given a governmental entity to operate in a particular given area, that the legislature contemplated the kind of action complained of." *Lafayette*, 435 U.S. at 415 (opinion of Brennan, J.). *See also Boulder*, 455 U.S. at 55.

Boulder explicitly left open the issue whether a municipality must also show that its actions were "actively supervised by the State," as had been suggested by the plurality opinion in *Lafayette*. *Lafayette*, 435 U.S. at 410; *Boulder*, 455 U.S. at 51, n. 14. Though the Supreme Court has not addressed this question, this court and several other circuits have held that the requirement of "active state supervision" applies only to private persons seeking protection under the *Parker v. Brown* doctrine. *See, e.g., California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980). Municipalities, however, need make no showing of supervision by the State in suits challenging "traditional municipal functions." *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 383-84 (7th Cir. 1983) *cert. granted*, 104 S.Ct. 3508 (1984); *Gold Cross Ambulance & Tran. v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983).

Thus, to qualify for *Parker v. Brown* immunity, a city need only show that it is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and that the legislature contemplated that that policy might be implemented by the kind of actions challenged as anticompetitive. *Golden State*

Transit Corp. v. City of Los Angeles, 726 F.2d 1430, 1433 (9th Cir. 1984) (Los Angeles taxicab regulation found to be supported by "clearly articulated and affirmatively expressed state policy").

III.

The present case poses no close questions of legislative intent. The State of California has plainly established a "clearly articulated and affirmatively expressed" policy that supports Chula Vista's grant of an exclusive trash hauling contract to CVSS. In particular, section 66757 of the California Government Code explicitly authorizes the very actions taken by Chula Vista. It states:

> Notwithstanding any other provisions of law, each * * * city * * * may determine * * * (b) whether [solid waste handling] services are to be provided by means of non-exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding, or, if in the opinion of its governing body, the public health, safety, and well-being so require, *by partially or wholly exclusive franchise, contract, license, permit, or otherwise either with or without competitive bidding*. (Emphasis added).

The California Legislature unquestionably "contemplated" the measures adopted by Chula Vista.

Despite this statute's specificity, appellants seek to analogize it to the broad home rule provision at issue in *Boulder*. Appellants argue that § 66757 falls short of the standards required by *Lafayette* and *Boulder* because it fails to describe the particular regulatory procedure that municipalities must adopt if they choose to displace competition in the trash removal market. Because of this failure, appellants contend, §66757 simply abdicates state policy-making responsibility to local governments in the manner forbidden by the *Boulder* decision.

We disagree with appellants' interpretation of *Boulder*. Federal antitrust laws do not require that state legislatures define the options available to municipalities with greater specificity than is displayed by § 66757. The Supreme Court's holding in *Boulder* is not so rigid. The "general grant of authority to enact ordinances" in *Boulder* was held insufficient to provide *Parker v. Brown* immunity because it did not show "an affirmative addressing of the subject [of cable television regulation] by the State." *Boulder*, 455 U.S. at 55. By contrast, the California Legislature has affirmatively addressed the subject of local trash collection and has specifically authorized municipalities to grant exclusive trash collection franchises, without competitive bidding, as Chula Vista has done. The legislature undeniably contemplated that municipalities would grant such franchises, and it approved their doing so.

IV.

Appellants further argue that Chula Vista's supervision of CVSS's rates has been inadequate and that the city has, in effect, relegated uncontrolled monopoly power to CVSS, a private company. The actions of a private person are not exempt from federal antitrust laws under *Parker v. Brown* unless actively supervised by the State. *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980). Appellants claim that no such supervision of CVSS was provided. We disagree.

In *Midcal*, the Court held that a resale price maintenance scheme did not constitute protected state action where resale prices were filed with, but not reviewed by, a state agency. The Court stated:

> The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in "pointed reexamination" of the program.

445 U.S. at 105-106. *See also Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (antitrust immunity not conferred on conduct simply because it was incorporated in tariffs filed with public utilities commission).

Here, by contrast, Chula Vista does not passively accept the rate proposals submitted by CVSS. All rate proposals are reviewed by the city finance department and must be approved by vote of the City Council. Unlike the situation in *Midcal*, the City of Chula Vista does review the reasonableness of CVSS's rates, and the rates in effect are directly attributable to action of the city, not mere "acquiesce[nce] in an anticompetitive policy adopted on a private party's initiative." *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275 n. 5 (9th Cir. 1982). *See also Turf Paradise, Inc. v. Arizona Downs*, 670 F. 2d 813, 825 (9th Cir. 1982) (selection of race dates by private contract is state action if subject to thorough investigation by State Racing Commission).

Appellee contends that the review conducted by the city is less intensive than required in a number of public utility ratemaking cases. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104 (1939). We find this analogy to be unhelpful. The particular statutory schemes dealt with in those cases are, of course, not at issue here. Nor do we believe that the Sherman Act requires cities to treat all city contractors as public utilities. For purposes of *Parker v. Brown* antitrust immunity, the city need only show that it "pointedly reexamines" the proposals submitted by the private party. That requirement has been met here.

V.

The exclusive franchise system for trash collection and removal in this case was instituted in accordance with a clearly articulated and affirmatively expressed state policy, specifically authorizing the displacement of competition and contemplating the adoption

of the conduct challenged here as anticompetitive. To the extent that monopoly powers have been granted to private persons, they are actively supervised by municipal officials. Chula Vista's trash collection franchise is immune from antitrust scrutiny under the doctrine of *Parker v. Brown*, and the district court's order denying immunity is therefore REVERSED.

B.

DISTRICT COURT'S ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; FINDINGS OF FACT AND CONCLUSION OF LAW

EDITOR'S NOTE

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TOM HUDSON & ASSOCIATES, INC., et al., Plaintiffs, vs. CITY OF CHULA VISTA, et al., Defendants.	NO. 821723 G (M) ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The hearing on the Plaintiff's Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment came on regularly to be heard on August 23, 1983, in Department 7 of the above-entitled Court, the Honorable EARL B. GILLIAM, Judge presiding. Plaintiffs appeared through their attorneys of record, Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey by Robert C. Fellmeth and Arthur N. Buck. Defendants CHULA VISTA SANITARY SERVICES, INC. and SCA SERVICES, INC., appeared through their attorneys of record, O'Melveny & Myers by Patrick Lynch and Thomas E. Gibbs. Defendant CITY OF CHULA VISTA appeared through its attorneys of record, Thomas J. Harron, Acting City Attorneys. The

Court, after having considered both written oral argument, and substantial evidence offered by all parties, and good cause appearing therefor,

IT IS HEREBY ORDERED AS FOLLOWS:

1. Defendants' Motion for Summary Judgment is hereby denied.

2. Plaintiffs' Motion for Partial Summary Judgment as to the liability issue of all causes of action is hereby granted in favor of Plaintiffs, and each of them, including TOM HUDSON, TOM HUDSON & ASSOCIATES, INC., GEORGE N. BAGDASARIAN, G.B. SERVICES, INC., dba SAN DIEGO REFUSE CO.

3. All Defendants are hereby found to be jointly and severally liable. However, as to the CITY OF CHULA VISTA, only, the remedy available to the Plaintiffs, is limited to the injunctive relief sought in the Complaint.

4. This Order involves controlling questions of law as to the applicability of the federal antitrust law and California state law to Chula Vista's award of an exclusive five-year trash collection franchise. There is substantial ground for difference of opinion as to these questions. Appellate resolution of these questions is likely to materially advance the ultimate termination of this litigation.

Therefore, pursuant to 28 U.S.C. § 1292(b), these questions are appropriate for appellate resolution.

DATED: Sept 19, 1983

Earl B. Gilliam
HON. EARL B. GILLIAM, JUDGE
UNITED STATES DISTRICT COURT

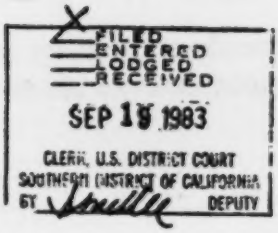
Approved as to form:

O'MELVENY & MYERS

By Patrick Lynch
Patrick Lynch
Attorneys for
Chula Vista Sanitary
Services, Inc. and
SCA Services, Inc.
and on behalf of
City of Chula Vista

FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG, MANLEY & CASEY

By Robert C. Fellmeth
Robert C. Fellmeth
Attorneys for Tom Hudson &
Associates, Inc. and
Tom Hudson, et. al.



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TOM HUDSON & ASSOCIATES, INC., TOM HUDSON, GEORGE N. BAGDASARIAN, and G.B. SERVICES, INC., dba SAN DIEGO REFUSE CO., Plaintiffs, v. CITY OF CHULA VISTA, SCA SERVICES, INC., and CHULA VISTA SANITARY SERVICE, INC., Defendants.	Case No. 821723 G(M) FINDINGS OF FACT AND CONCLUSIONS OF LAW PERTAINING TO ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The hearing on the Plaintiffs' Motion for Partial Summary Judgment came on regularly to be heard on August 23, 1983, in Department 7 of the above-entitled Court, the Honorable EARL B. GILLIAM, Judge presiding. Plaintiffs appeared through their attorneys of record, Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey by Robert C. Fellmeth and Arthur N. Buck. Defendants CHULA VISTA SANITARY SERVICES, INC. and

SCA SERVICES, INC. appeared through their attorneys of record, O'Melveny & Myers by Patrick Lynch and Thomas E. Gibbs. Defendant CITY OF CHULA VISTA appeared through its attorneys of record, Thomas J. Harron, Acting City Attorney. The Court, after having considered both written and oral argument, and substantial evidence offered by all parties, and good cause appearing therefor,

THIS COURT HEREBY FINDS that there is no triable issue as to the following:

FINDINGS OF FACT

1. All parties agree that there are few or no triable issues of fact.

2. The factual record of the case, including Stipulations and Admissions, constitutes an unusually complete factual framework over which there is little relevant dispute.

3. Defendants CITY OF CHULA VISTA ("CHULA VISTA") and CHULA VISTA SANITARY SERVICES, INC. ("CVSS") (wholly owned by SCA SERVICES, INC.), have agreed to allow only CVSS to operate a trashhauling enterprise within the City limits of Chula Vista, a city with a population of 86,000 occupying approximately 20 square miles.

4. Plaintiffs TOM HUDSON and GEORGE N. BAGDASARIAN are residents of San Diego County, California. Neither are residents of the City of Chula Vista. Plaintiffs TOM HUDSON & ASSOCIATES, INC. and G.B. SERVICES, INC., dba SAN DIEGO REFUSE CO. are California corporations with their principal place of business in San Diego County, California.

5. Plaintiffs' standing in this litigation is based upon their status as potential competitors to CVSS and SCA SERVICES, INC., and that the plaintiffs desired to and attempted to bid or

otherwise compete for the right to haul trash within CHULA VISTA.

6. The exclusive right of CVSS to engage in trashhauling extends to all residential and commercial trashhauling operations; no competing trashhauler is allowed to operate or serve any customer within CHULA VISTA.

7. CHULA VISTA shares in the revenue from the trashhauling, receiving four and one-half percent of the gross receipts realized by CVSS from trashhauling operations within CHULA VISTA.

8. CHULA VISTA requires all property owners of single family residences or multiple dwelling units with 4 units or less to utilize the services of CVSS and to pay the fees charged by CVSS for trashhauling, unless they can certify their own weekly disposal of garbage by exemption application to CVSS.

9. CHULA VISTA and CVSS have agreed to the fees to be charged for said trashhauling services, both residential and commercial.

10. CHULA VISTA and CVSS have agreed that all competing trashhaulers are to be excluded from competition within the City of CHULA VISTA.

11. There is no reasonable substitute to the residents of CHULA VISTA for trashhauling services within the relevant market of CHULA VISTA.

12. CHULA VISTA granted CVSS the sole right to collect both residential or commercial trash for five years without competitive bidding or any other meaningful competitive process.

13. The agreement to grant exclusive rights and to exclude all competitors of CVSS took the form of an ordinance and an agreement between the defendants which did not impose any required

system of independent state supervision by CHULA VISTA or any other agency of the State.

14. To the extent any rate review occurred by CHULA VISTA. it was not required but was discretionary, and lacked minimal guidelines and standards, under the procedures as admitted by defendants.

THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

CONCLUSIONS OF LAW

1. Price fixing and group boycotts of the kind engaged in by defendants are *per se* antitrust offenses, violative of Section 1 of the Sherman Act.

2. A combination with the explicit intent and effect to monopolize a relevant market is a violation of Section 2 of the Sherman Act.

3. For the actions of a City which othewise [*sic*] would violate Federal antitrust statutes to be immune from liability, there must be legitimate "State action."

4. The two statutes relied upon by Defendants to constitute "State action" (Health & Safety Code, Section 4250, and Government Code, Sections 66,755 through 66,757) confer unlimited discretion to a non-sovereign entity to fashion restraints of trade and do not meet the test of specific authorization by the State Legislature required for State action.

5. The two statutes relied upon by Defendants to constitute "State action" include no system whatever for required "independent State supervision," either by a State agency or by any other public entity.

6. Rate regulation by Chula Vista was not required by Chula Vista ordinance as a part of the monopoly agreement; even if properly authorized by State law, the deficient rate regulation as admitted by Chula Vista and the lack of competitive bidding fail to meet minimal standards of "independent State supervision."

DATED: Sept 19, 1983

Earl B. Gilliam
HON. EARL B. GILLIAM, JUDGE
UNITED STATES DISTRICT COURT

Respectfully submitted by:

FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG, MANLEY & CASEY

By: Robert C. Fellmeth
ROBERT C. FELLMETH
Attorneys for Plainiffs

C.

JUDGMENT OF THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT, AND OPINION DENYING PETITION FOR REHEARING

JUDGMENT **MANDATE ISSUED FEB 13 1985**

United States Court of Appeals
FOR THE NINTH CIRCUIT

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SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

TOM HUDSON & ASSOCIATES, INC., and TOM HUDSON,

Plaintiffs-Appellees,

vs

CITY OF CHULA VISTA, SCA SERVICES, INC., and CHULA VISTA SANITARY SERVICE, INC.,

Defendants-Appellants.

No. 83-6467

DC#CV 82-1723-EBG

APPEAL from the United States District Court for the SOUTHERN District of CALIFORNIA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the SOUTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED.

A TRUE COPY FEB 13 1985
ATTEST
Clerk of Court
By Deputy Clerk

Filed and entered OCTOBER 25, 1984

C-2 CALENDAR: 4/30/85 remanded Rest/ea/t 6/2/85 SKS

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PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOM HUDSON & ASSOCIATES, INC., and TOM HUDSON, Plaintiffs-Appellees, v. CITY OF CHULA VISTA, SCA SERVICES, INC., and CHULA VISTA SANITARY SERVICE, INC., Defendants-Appellants.	No. 83-6467 D.C. No. CV 82-1723 OPINION

Before: ANDERSON, SKOPIL and POOLE, Circuit Judges

The panel has voted to deny appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

D.

STATUTES AND ORDINANCES

CALIFORNIA GOVERNMENT CODE SECTION 66757

§ 66757. Authority of local agencies

Notwithstanding any other provision of law, each county, city and county, city, special district, or other local governmental agency may determine all of the following:

(a) Aspects of solid waste handling which are of local concern including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, nature, location, and extent of providing solid waste handling services.

(b) Whether such services are to be provided by means of nonexclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding, or, if in the opinion of its governing body, the public health, safety and well-being so require, by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding. Such authority to provide solid waste handling services may be granted under such terms and conditions as are prescribed by the governing body of the local governmental agency by resolution or ordinance.

(c) Nothing in this chapter shall modify or abrogate in any manner any franchise heretofore granted or extended by any county or other local governmental agency.

The provisions of this article do not require any local agency to provide for services, or for any level of service, but, instead, specify the means by which services, if provided, may be performed. Notwithstanding any other provisions of law to the contrary, no local agency shall in any way be liable for its failure to provide service or for any action or failure to act by a solid waste enterprise.

CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200, *et seq.* (RELEVANT PORTIONS)

§ 17200. Definition

As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

. . .

§ 17202. Specific or preventive relief

Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

§ 17203. Remedies and jurisdiction

Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

. . .

CITY OF CHULA VISTA
ORDINANCE NUMBER 1993

Revised 7/28/82

ORDINANCE NO. 1993

AN ORDINANCE OF THE CITY OF CHULA VISTA GRANTING TO CHULA VISTA SANITARY SERVICE, ITS SUCCESSORS AND ASSIGNS, THE FRANCHISE TO COLLECT AND DISPOSE OF REFUSE AND TO USE THE PUBLIC STREETS AND PLACES WITHIN THE CITY OF CHULA VISTA FOR SAID PURPOSE

The City Council of the City of Chula Vista does ordain as follows:

SECTION 1. **Definitions.**

Whenever in this ordinance the words or phrases hereinafter in this section defined are used, they shall have the respective meaning assigned to them in the following definitions (unless in the given instance, the context wherein they are used shall clearly import a different meaning):

(a) "Grantee" shall mean the Chula Vista Sanitary Service and its lawful successors or assigns.

(b) "City" shall mean the City of Chula Vista, a municipal corporation of the State of California in its present incorporated form or in any later reorganized, consolidated, enlarged or reincorporated form.

(c) "Streets" shall mean the public streets, ways, alleys and places as the same now or may hereafter exist within

said city, including state highways now or hereafter established within said city.

(d) "Gross Receipts" shall mean all gross operating revenues received by grantee from the collection and disposal of refuse within the City of Chula Vista.

SECTION 2. **Purpose.**

The franchise to collect and dispose of refuse within the City of Chula Vista and to use for such purposes the public streets, ways and places within said City is hereby granted to Chula Vista Sanitary Service, its successors and assigns.

SECTION 3. **Term.**

Said franchise shall be for the term of five (5) years from and after the effective date herein or until the state or some municipal or public corporation duly authorized by law shall purchase by voluntary agreement all property actually used and useful in the exercise of said franchise, or until said franchise shall be forfeited for noncompliance with its terms as provided herein. During such term, Grantee shall have the exclusive right to collect and dispose of all refuse created, accumulated or produced within the City of Chula Vista.

SECTION 4. **Consideration.**

The Grantee of said franchise shall during the term thereof pay to the City four and one-half percent (4½%) of the gross annual receipts of said Grantee. It is understood that any legislative modification of said franchise fee shall be cause for review and renegotiation of the amount of the franchise fee at any time within the term of this franchise.

SECTION 5. **Reports, Dates of Payment and City Audit.**

The Grantee shall file with the Director of Finance of said City on a monthly basis commencing on August 1, 1982, and monthly thereafter, a duly verified statement showing in detail the total gross receipts of such Grantee during the preceding month or fractional month from the collection and disposal of refuse within said City. Grantee shall pay to said City within fifteen (15) days after the time of filing of such statement, in lawful money of the United States, the aforesaid percentage of its gross receipts for such month, or such fractional month, covered by such statement. any neglect, omission or refusal by Grantee to file such verified statement or to pay such percentage at the time and in the manner specified shall be grounds for the declaration of a forfeiture of this franchise and all rights of Grantee hereunder.

SECTION 6. **Compliance with Laws.**

Grantee shall comply with all laws and regulations of the State of California and the City of Chula Vista. Further Chapter 8.24 of the Chula Vista Municipal Code is expressly made a part of this franchise and incorporated it herein by reference as if set forth in full. Grantee and City agree to be bound by all provisions of such ordinance, or any amendments thereto, or other ordinances that might affect the collection or disposal of refuse in the City. It is understood that said ordinances are intended to be minimum standards and that higher standards and regulations may be required under the franchise.

SECTION 7. **Obligations of Grantee.**

Grantee undertakes and agrees, for the consideration hereinafter mentioned, to furnish: all labor, equipment, and vehicles (including adequate equipment and vehicles in a standby capacity to provide the service herein required in the event of a breakdown of equipment); insurance and bonds necessary to insure the efficient and timely picking up, collecting, removing and disposing of City

refuse; and to collect, pick up, remove and dispose of, all refuse which is generated or accumulated by or upon all property within the City during the time that this franchise is in effect, except as herein otherwise provided and subject to and in accordance with the terms and provisions hereof.

The collection and removal of said refuse by Grantee shall be, at all times during the term of this franchise performed to the satisfaction of the City Manager or his delegate who shall have the right to issue orders, directions and instructions to Grantee from time to time with respect to the collection, transportation, and removal of refuse, the performance of Grantee's services hereunder, and the Grantee's compliance with the provisions of the ordinances of the City of Chula Vista as they now exist or may from time to time be amended, and Grantee agrees to comply therewith. Such collection and removal of refuse shall be done in a prompt, thorough, lawful and workmanlike manner.

Grantee shall submit a detailed plan of operation prior to beginning of his work pursuant to this franchise. It shall describe the routes to be established and shall contain details regarding servicing schedules, the equipment to be used, and alternate procedures to be followed in the event of severe weather or equipment failures.

Grantee shall provide and maintain at his own expense, a solid waste collection system capable of providing service to all entities in the City requiring, or required to avail itself of said service. Not less than one regular weekly collection shall be provided to each residential unit. Grantee shall provide bins as required for commercial customers or whenever other customers of Grantee request their use. Each bin shall be placed in an accessible, outside location on a hard surface according to individual agreement.

Grantee shall provide collection vehicles and equipment in amounts adequate to perform in accordance with its operational plan. Initially, and throughout the franchise term, the average age

of all regularly assigned collection vehicles must be not more than four (4) years, and all must be radio controlled. Collection vehicles, containers, and other contractor furnished equipment must comply with the standards set forth in the Chula Vista Municipal Code.

All refuse collected by Grantee shall become the property of Grantee immediately upon the collection thereof, and shall be forthwith removed and transported by Grantee to an approved place of disposal, which shall be provided, arranged for or furnished by Grantee.

In the event Grantee fails, refuses, or neglects to collect and dispose of refuse set out or placed for collection at the time and in the manner herein required, City may collect and dispose of the same or cause the same to be collected and disposed of and Grantee shall be liable for all expenses incurred in connection therewith. Such remedy of City shall be cumulative and in addition to any and all other remedies it may have in the event of such failure, refusal or neglect of Grantee. The collection and disposal of refuse by City or by others as aforesaid shall not be deemed an election of remedies which shall preclude City from availing itself of additional remedies for Grantee's breach of contract.

The following shall be considered legal holidays for purposes of this agreement: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. Any other days must have prior written approval from the City. When a regularly scheduled residential collection falls on a legal holiday, the collection for that day and succeeding days of that week shall be rescheduled one day later. Holiday disruptions of commercial collections shall be handled in a manner mutually agreeable to the Grantee and individual customers.

Grantee agrees to provide and maintain litter containers for the use of the general public for public areas such as plazas and rights-of-way other than parks and those publicly owned facilities

maintained by the city as specifically designated by resolution of the city and to empty and dispose of the contents as necessary.

Grantee shall prepare and furnish to all customers not less than four (4) days prior to the beginning of or change in service, schedules setting forth the days on which the collections shall be made. Notice shall be in such form as is first approved by the City Manager or his delegate.

SECTION 8. **Disposal Requirements.**

Grantee shall be obligated as set forth hereinabove to provide for the collection and the disposal of all refuse within the City of Chula Vista; provided, however, Grantee shall undertake the disposal of said refuse in accordance with specific direction of City if at any time during the period of this franchise, City shall determine that the public interest requires a disposal program differing from that which the Grantee has established.

SECTION 9. **Rates for Collection.**

City and Grantee mutually agree that the initial rates to be paid by the residents and industrial and commercial enterprises in the City of Chula Vista shall be those as presently established by Resolution No. 10585 adopted on August 4, 1981; provided, however, that said rates shall be reviewed on or about October 1, 1982 in accordance with the terms and conditions of this franchise. The City Council of the City of Chula Vista may at any time by amending Chapter 8.24 of the Chula Vista Municipal Code, establish a program for preferential rates for senior citizens or other classifications which are deemed to be in the public interest.

It is mutually agreed that the City Council of the City of Chula Vista shall have the authority and duty from time to time during the term of this franchise to review, act, establish and modify the rates and charges the Grantee may charge or collect from either single family residential, multiple family residential, commercial

or industrial users. The authority of the City Council except as provided herein shall be limited to fixing just, reasonable and sufficient rates and charges where the Council, after a hearing, finds from the evidence submitted and testimony offered, that the existing rates are insufficient, excessive, unjust, unreasonable, discriminatory or preferential, except as provided by ordinance, and then shall adopt a resolution establishing an appropriate rate structure.

SECTION 10. **Insurance and Performance Bond.**

Grantee agrees, at Grantee's own expense, to carry comprehensive public liability and automobile liability insurance coverage during the full term of this franchise, with City also named as an additional insured thereunder, covering liability for bodily injuries, death and property damage, arising out of or in connection with the operations of Grantee, under this franchise in an amount not less than $1,000,000 for injuries including death to any one person and in an amount not less than $5,000,000 for any one accident or occurrence, and property damage in an amount not less than $200,000. Grantee further agrees to carry, at Grantee's own expense, workers' compensation insurance in accordance with the laws of the State of California. All of said insurance policies, or certificates thereof, shall be deposited by Grantee with the City Manager together with endorsements or statements from the insuring companies providing that such policies will not be subject to cancellation, modification or reduction of the limits of the policy until ninety (90) days after written notice to the City by registered or certified mail. Such policies shall guarantee payment of any final judgment rendered against Grantee or the City within the coverage provided, irrespective of the financial condition of, or any acts or omissions of, said Grantee. All of said policies shall be subject to the approval of the City Attorney.

Grantee shall secure and deliver to City Manager a twelve (12) month performance bond in the amount of $1,000,000 to secure the full, true and faithful performance of all their terms,

obligations and conditions of this franchise on the part of Grantee. Grantee shall present said bond together with a certificate from the surety showing payment in full for such bond, to the City Manager prior to the commencement of operations pursuant hereto, and provide a one-year renewal and certificate of payment prior to the start of each year of this agreement.

In the event of the termination or cancellation of the insurance or bond required hereunder or the failure of Grantee to provide such other insurance and/or bond as hereinabove provided, prior to the effective date of such cancellation or termination, this franchise may be suspended or terminated forthwith by City, by written notice thereof to Grantee. Any such suspension shall be for such period or periods as the City Manager from time to time may determine. No liability or obligation shall be incurred by City in favor of Grantee by virtue of any such notice or notices or from any such suspension or termination. In the event of such suspension or termination by City upon the failure of Grantee to secure and maintain on file said insurance and/or bond during the full term of this franchise, Grantee shall be liable for any and all damages suffered by City arising out of such suspension or termination.

SECTION 11. **Hold Harmless.**

Grantee of the franchise granted hereby shall indemnify, save and hold harmless, City and any officers and employees thereof against and from all damages, judgments, decrees, costs and expenditures which City, or such officer or employee, may suffer, or which may be recovered from, or obtainable against City, or such officers or employee, for, or by reason of, or growing out of or resulting from the exercising by Grantee of any or all of the rights or privileges granted hereby, or by reason of any act or acts of Grantee or its servants or agents in exercising the franchise granted hereby, and Grantee shall defend any suit that may be instituted against City, or any officer or employee thereof, by reason of or growing out of or resulting from the exercise by Grantee of any or

all of the rights or privileges granted hereby, or by reason of any act or acts of Grantee, or its servants or agents, in exercising the franchise granted hereby.

SECTION 12. **Obligations of City.**

Except as hereinafter otherwise provided, Grantee shall have the sole right to pick up, gather, and remove refuse generated by residential and commercial property within the City except as otherwise provided in Section 8.24.080 of the Municipal Code and any other amendments thereto by the City until such time as this franchise is terminated as herein provided. City will not let any contract to, or enter into any contract with, any other person, firm, or corporation for the performance of the services herein required to be performed by Grantee, except as expressly otherwise herein provided, as long as this franchise is in effect.

City shall protect Grantee's rights to such exclusive contract by proper ordinances, and by reasonable enforcement thereof.

SECTION 13. **Miscellaneous.**

The failure of either party at any time to require performance by the other of a provision hereof, shall in no way affect the right of such party entitled to performance to enforce the same thereafter. Nor shall the waiver of either party of any breach of any provisions hereof be construed to be a waiver of such provisions or of any succeeding breach thereof.

Any notice that may be given to Grantee under or with respect of this franchise shall be deemed to have been given when delivered to Grantee or to an officer of Grantee, personally or when sent to Grantee by registered or certified mail, postage prepaid, addressed to Grantee at:

Chula Vista Sanitary Service
311 F Street
P. O. Box 967
Chula Vista, Ca. 92012

City reserves the right to determine, in the exercise of its powers to provide for the public health and welfare, whether technological or other changes materially affect the necessity of or level of the service provided for hereunder, and, in such case, the level of service hereunder shall be adjusted by City, and this franchise shall be reviewed and revised accordingly.

SECTION 14. **Forfeiture.**

This franchise is granted upon each and every condition herein contained, and shall ever be strictly construed against Grantee. Nothing shall pass by the franchise granted hereby to Grantee unless it be granted in plain and unambiguous terms. Eachof said conditions is a material and essential condition to the granting of the franchise. If Grantee shall fail, neglect or refuse to comply with any of the conditions of the franchise granted hereby, and if such failure, neglect or refusal shall continue for more than thirty (30) days after written demand by the City Manager for compliance therewith, then City, by the City Council, in addition to all rights and remedies allowed by law, thereupon may terminate the right, privilege and franchise granted in and by this ordinance, and all the rights, privileges and the franchise of Grantee granted hereby shall thereupon be at an end. Thereupon and immediately, Grantee shall surrender all rights and privileges in and to the the [*sic*] franchise granted hereby. No provision herein made for the purpose of securing the enforcement of the terms and conditions of the franchise granted hereby shall be deemed an exclusive remedy or to afford the exclusive procedure for the enforcement of said terms and conditions, but the remedies and procedure outlined herein or provided, including forfeiture, shall be deemed to be cumulative.

SECTION 15. **Authority for Grant.**

Notwithstanding any other provision herein contained, this franchise is granted solely and exclusively under Sections 1200, 1201, 1202, 1203, 1204, 1205 and 1206 of Article XII of the Charter of the City of Chula Vista and no other authority.

SECTION 16. **Effective Date.**

This ordinance shall become effective thirty days after its final passage unless suspended by a referendum petition filed as provided by law.

SECTION 17. **Publication Costs.**

The Grantee of said franchise shall pay to the City a sum of money sufficient to reimburse it for all publication expenses incurred by it in connection with the granting thereof; such payment to be made within thirty (30) days after the City shall have furnished such Grantee with a written statement of such expense.

SECTION 18. **Written Acceptance.**

The franchise granted hereby shall not become effective until written acceptance thereof shall have been filed by the Grantee with the City Clerk.

SECTION 19. **Publication.**

The City Clerk shall cause this ordinance to be published once within fifteen (15) days after its passage in the Chula Vista Star News, a newspaper of general circulation published and circulated in said City.

Presented and Approved as to form by

/s/
George D. Lindberg, City Attorney

CITY OF CHULA VISTA
ORDINANCE NUMBER 2104

Revised 2/28/85

ORDINANCE NO. 2104

AN ORDINANCE OF THE CITY OF CHULA VISTA AMENDING ORDINANCE NO. 1993 EXTENDING CHULA VISTA SANITARY SERVICE'S FRANCHISE TO COLLECT AND DISPOSE OF REFUSE WITHIN THE CITY OF CHULA VISTA

The City Council of the City of Chula Vista does ordain as follows:

SECTION I: That Sections 3, 4, 9 and 11 of Ordinance No. 1993 are amended to read as follows:

Section 3. **Term.**

The franchise term shall be extended for the term of five (5) years from and after the current termination date of September 4, 1987 or until the state or some municipal or public corporation duly authorized bylaw shall purchase by voluntary agreement all property actually used and useful in the exercise of said franchise, or until said franchise shall be forfeited for noncompliance with its terms as provided herein. In addition, the grantee shall have two five-year renewal options if the grantee is not in breach of this ordinance and has performed in the manner found satisfactory by the City. The five-year extension and the two five-year options are conditioned upon the grantee constructing a new operating service facility within the City of Chula Vista within fifteen (15) months of the adoption of this ordinance. Said facility including land and improvements to cost approximately $1.5 million. During such term, grantee shall have the exclusive right to collect and dispose of all refuse

created, accumulated or produced within the City of Chula Vista.

Section 4. **Consideration.**

The grantee of said franchise shall during the term thereof pay to the City four and one-half percent (4½%) of the gross annual receipts of said grantee. City is authorized to increase said fee up to a maximum amount of ten percent (10%). Beginning April 1, 1986, the franchise fee shall be increased by one-half percent (½%) and one-half percent (½%) each year thereafter until it reaches a maximum of ten percent. It is understood that any increase in the franchise fee by the City shall be cause for the grantee to increase charges in order to "pass through" the cost of the franchise fee.

Section 9. **Rates for Collection.**

City and grantee mutually agree that the initial rate to be paid by the residents, industrial and commercial enterprises in the City of Chula Vista, shall be those as presently established by Resolution No. 11911, adopted on January 22, 1985. The City Council of the City of Chula Vista may at any time, by amending Chapter 8.24 of the Chula Vista Municipal Code, establish a program for preferential rates for senior citizens or other classifications which are deemed to be in the public interest.

Beginning on April 1, 1986, grantee may, upon filing a notice of intention forty-five (45) days in advance with the City Manager, increase rates subject to the following conditions and limitations:

(1) The amount of the increase shall be limited by the percentage increase since grantee's last rate increase in the San Diego area Consumer Price Index for all urban consumers as compiled by the United States Department of Labor Bureau of Labor Statistics for the latest twelve-month

period for which statistics are available. In no event shall the amount of the increase exceed six percent (6%) of the service rates.

(2) In the event that the Consumer Price Index referred to in Paragraph (1) above shall no longer be published, then another similar generally recognized index may be substituted upon approval of the City.

(3) Annual increases shall be subject to the review and approval of the City Manager. The City Manager shall notify grantee in writing of approval of the increase within twenty (20) calendar days of receipt of accurate and complete information satisfactorily supporting any increase requested in accordance with Paragraph (1) above. The City Council shall have the unilateral right to require a hearing for any rate increase at its discretion. If the City intends to require a public hearing, it shall notify grantee within said twenty (20) day period. In the absence of any written communication from the City Manager or Council within said twenty (20) days to the contrary, the increase is deemed approved.

(4) No more than one such increase may be implemented in any one calendar year although grantee shall have at any time the right to submit a request to the City Council for additional rate relief at any time extraordinary expenses are incurred.

(5) Where landfill charges are increased, grantee shall notify City of its intention to "pass through" said costs thirty (30) days prior to increasing its rates. The City Council shall have the option to require a public hearing on this increase at its discretion. If the City does not notify grantee of its intention to require a pubic hearing within the thirty (30) day notice period, grantee is authorized to increase rates.

SECTION 11. **Hold Harmless.**

Grantee of the franchise granted hereby shall indemnify, save and hold harmless, City and any officers and employees thereof against and from all damages, judgments, decrees, costs and expenditures which City, or such officer or employee, may suffer, or which may be recovered from, or obtainable against City, or such officers or employee, for, or by reason of, or growing out of or resulting form the exercising by Grantee of any or all of the rights or privileges granted hereby, or by reason of any act or acts of Grantee or its servants or agents in exercising the franchise granted hereby, and grantee shall defend any suit that may be instituted against City, or any officer or employee thereof, by reason of or growing out of or resulting from the exercise by Grantee of any or all of the rights or privileges granted hereby, or by reason of any act or acts of Grantee, or its servants or agents, in exercising the franchise granted hereby. This hold harmless clause shall apply to any extension of the franchise.

SECTION II: That a new Section 20 is added to Ordinance No. 1993 to read as follows:

Section 20. **Special Events.**

Grantee agrees to cooperate with the City to carrying out special events to improve community appearance.

SECTION III: This ordinance shall take effect and be in full force on the thirty-first day from and after its adoption.

Presented by

/s/ John D. Goss
John D. Goss, City Manager

Approved as to form by

/s/ Thomas J. Harron, City
Thomas J. Harron, City Attorney

0035a

FIRST READ AT A REGULAR MEETING OF THE CITY COUNCIL OF THE CITY OF CHULA VISTA, CALIFORNIA, HELD February 26, 1985, AND FINALLY PASSED AND ADOPTED AT A REGULAR MEETING THEREOF HELD March 5, 1985, BY THE FOLLOWING VOTE, TO-WIT:

AYES:	Councilmen	Malcolm, Moore, Cox
NAYES:	Councilmen	McCandliss
ABSTAIN:	Councilmen	Scott
ABSENT:	Councilmen	None

/s/ Gregory R. Cox
Mayor of the City of Chula Vista

ATTEST /s/ Jennie M. Fulasz
City Clerk

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss.
CITY OF CHULA VISTA)

I, JENNIE M. FULASZ, CMC, CITY CLERK of the City of Chula Vista, California, DO HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of ORDINANCE NO. 2104, and that the same has not been amended or repealed.

DATED March 6, 1985

/s/
City Clerk

Office - Supreme Court, U.S.
FILED
MAY 31 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TOM HUDSON AND ASSOCIATES, INC.,
GEORGE N. BAGDASARIAN, AND G.B. SERVICES, INC.,
dba SAN DIEGO REFUSE CO.,
Petitioners,

v.

CITY OF CHULA VISTA, SCA SERVICES, INC.,
AND CHULA VISTA SANITARY SERVICES, INC.,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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May 31, 1985

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No. 84-1707

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CITY OF CHULA VISTA, SCA SERVICES, INC.,
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For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The petition in this case is simply a convoluted plea for reconsideration of the two issues conclusively decided in *Town of Hallie v. City of Eau Clair*, ... U.S. ....; 105 S.Ct. 1713 (March 27, 1985) and *Southern Motor Carriers Rate Conference v. United States*, ... U.S. ....; 105 S.Ct. 1721 (March 27, 1985). Those issues are (1) the requisites for a state delegation of authority for a municipal government to supplant competition with municipal regulation, and (2) the extent of supervision required where a municipality regulates the provision of a traditional public service.

The bulk of petitioners' argument is addressed to the first issue, i.e. "how clearly a state policy must be articulated to a municipality to be able to establish that its anticompetitive activity constitutes state action." *Town of Hallie*, 105 S.Ct. at 1717; Ptn. at ii-iii, 14-18, 22-28. The Court has answered this question. State authorization of municipal regulation is sufficient if " 'the legislature contemplated the kind of action complained of.' " *Town of Hallie*, 105 S.Ct. at 1719, *quoting City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978). This is exactly the standard the Ninth Circuit applied, quoting the very same passage from *Lafayette*. *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d 1370, 1373 (9th Cir. 1984); Ptn. Appx. at A-4.

While the application of the *Town of Hallie* standard to the present case is hardly an issue warranting review in this Court, it is an easy issue. There is no doubt that the California legislature "contemplated the kind of action complained of " — the statute in issue *expressly* authorized the City of Chula Vista to provide for trash collection in *precisely* the manner chosen. Cal. Gov't Code § 66,757. In fact, petitioners' attack is focused principally on the very clarity of that legislative authorization. *See e.g.*, Ptn. at 25. As the Court of Appeals said, "[t]he present case poses no close questions of legislative intent." *Hudson & Associates, supra*, 746 F.2d at 1373; Ptn. Appx. at A-5.

The remainder of the petition raises, in various ways, the second issue decided in *Town of Hallie* — "the question of whether action by a municipality — like action by a private party — must satisfy the 'active state supervision' requirement. . . . " 105 S.Ct. at 1717; Ptn. 18-22, 27. On this point, the Ninth Circuit was likewise correct in its anticipation of this Court's holding. In *Town of Hallie*, the Court held that: "the active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Town of Hallie*, 105 S.Ct. at 1720 (footnote omitted). The Court of

Appeals used, if anything, a more narrow standard in this case: "Municipalities . . . need make no showing of supervision by the State in suits challenging 'traditional municipal functions.' . . ." *Hudson & Associates,* 746 F.2d at 1373; Ptn. Appx. at A-4.

The petitioners contend that the actor here is not the city but Chula Vista Sanitary Service, a private firm. Ptn at 20. The "active supervision" test clearly applies to a private actor. *Town of Hallie,* 105 S.Ct. at 1720 n.10. The Ninth Circuit correctly noted that the prices charged for trash collection service in Chula Vista are, in law and in reality, the result of municipal action. "[T]he rates in effect are directly attributable to action of the city. . . ." *Hudson & Associates,* 746 F.2d at 1374; Ptn. Appx. at A-7.

On the other hand, if rates are considered to result from private action (because the private franchisee may apply for rate changes), there is, likewise, no issue requiring the Court's attention. The Court of Appeals held, as the record required it to hold, that there is active supervision of CVSS' rates by the City of Chula Vista:

> "Chula Vista does not passively accept the rate proposals submitted by CVSS. All rate proposals are reviewed by the city finance department and must be approved by vote of the City Council." *Hudson & Associates,* 746 F.2d at 1374; Ptn. Appx. at A-7.[1] *See also, United States v. Southern Motor Carriers Rate Conf.,*

[1] Petitioners ask the Court to take judicial notice of an amendment of the 1982 franchise which provides, *inter alia,* for automatic approval of cost-of-living increases and pass-through of certain costs. Ptn. Appx. D14-16. All such changes in rates are subject to review and rejection by the city. *Id.* This outside-the-record change in the manner chosen by the City of Chula Vista to regulate trash collection rates does not undermine the Court of Appeals' holding that Chula Vista Sanitary Service ("CVSS") has been actively supervised as to its rates. The only increases CVSS may implement without specific prior authorization of the city are those resulting from clerical application of an objective formula mandated and approved by the city.

702 F.2d 532, 539 (5th Cir. 1983), *aff'd*, ... U.S. . ....., 105 S.Ct. 1721 (March 27, 1985).

It serves no purpose to reply to petitioners' long-winded attack on the *wisdom* of the California legislature's decision to delegate both the discretion and the authority to enable local officials to provide for trash collection in the manner best suited to the circumstances of the locality served. Ptn. 20-25. This Court has already answered all those arguments. *Town of Hallie,* 105 S.Ct. at 1719; *Southern Motor Carriers Rate Conference v. United States,* 105 S.Ct. at 1731. *And see, California Reduction Co. v. Sanitary Reduction Works,* 199 U.S. 306, 321 (1905). Petitioners urge that California's 5000 special districts, 480 cities and 58 county agencies are presumptively venal or incompetent. Contrary to this, this Court's holding that "[w]e may presume, absent a showing to the contrary, that [a] municipality acts in the public interest." *Town of Hallie,* 105 S.Ct. at 1720 (footnote omitted).

The petition presents no meritorious or important issue, and should be denied.

PATRICK LYNCH
THOMAS J. HARRON

Attorneys for Respondents

Of Counsel:
O'MELVENY & MYERS
MARK R. STEINBERG
May 31, 1985